Global Financial Services Regulatory Guide - United States of America

4. How do the licensing requirements apply to cross-border business in your jurisdiction?

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

# How do the licensing requirements apply to cross-border business in your jurisdiction?

**Banking**

In general, US banking laws and regulations, including licensure requirements, apply if a foreign bank or financial services firm has a presence in the United States where it conducts banking business, or solicits or conducts banking business through employees or agents based in the United States, through employees or agents based outside the United States, but who periodically travel to the United States to meet with customers, or otherwise through the use of US jurisdictional means (e.g., the US mail or US telephone lines). Generally, US federal laws do not prohibit a foreign bank from servicing deposit accounts of US persons outside of the US, nor do they require a bank to obtain a US federal banking license or other US federal banking approval or consent. However, lending activity, specifically mortgage lending, is generally regulated by state law and will need to be addressed on a state-by-state basis.

**Securities and Investments**

Generally, a foreign financial services firm that engages in a securities or investment business in the US, has a presence in the US where it conducts securities or investment business, or solicits or conducts a securities or investment business through employees or agents based in the US is required to register with the SEC as a broker-dealer. This is also true if the firm conducts a securities or investment business through employees or agents based outside the United States, but who periodically travel to the US to meet with customers, or otherwise through the use of US jurisdictional means (e.g., the US mail, email or US telephone lines). While certain exemptions may be available to foreign financial services firms who interact solely with US registered banks, broker-dealers or certain institutional investors, such exemptions require specific adherence to the applicable rules and may require the intermediation of a US registered broker-dealer.

The SEC takes an expansive view of its ability to enforce US securities laws in connection with the activities of persons or firms that use US jurisdictional means to solicit transactions with US "persons," and the concept of US "persons" also is quite broadly defined by statute.

Investment advisers also generally require registration with the US SEC; provided, however, US federal law provides certain limited exemptions for foreign investment advisers with no place of business in the US who advise a *de minimis* number of US persons, with less than USD 25 million under management. In addition, foreign advisers to private funds with US investors are exempt from registration under certain circumstances.

**Derivatives**

With respect to transactions involving futures contracts (and options thereon), if the solicitation, advice or management is occurring in the United States, registration will be required. Thus, to the extent that a person solicits orders, advises US residents or manages any investments from the United States, registration will be required, absent an exemption.

The Dodd-Frank Act added Section 2(i) to the CEA, which provides that the swap provisions of Title VII apply to cross-border activities when such activities have a “direct and significant connection with activities in, or effect on, commerce of the United States” or when they contravene CFTC rules or regulations aimed at preventing evasion of Title VII. Prior to the Dodd-Frank Act, swaps were not subject to CFTC regulation (or any federal agency regulation).

The CFTC has issued both a policy statement (the Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations ("**Guidance"**)) and Rule 23.23 the "Cross-Border Rule" ("**Rule**") regarding the cross-border application of the CFTC’s swaps regulatory regime. Although the Rule largely supersedes the Guidance, the Guidance will remain applicable to most swap arrangements prior to 14 September 2021, certain legacy swaps relationships until 31 December 2027, and with respect to certain CFTC rules (e.g., clearing and trade reporting determinations) until the CFTC adopts new cross-border rules or guidance with respect to those rules.

The application of most CFTC rules (other than margining and segregation of margin) to a cross-border transaction depends, in large part, on whether one of the counterparties to the transaction is a “US person,”as defined in the Guidance. The Guidance defined the term “US person” broadly to include, but not be limited to the following:

Any natural person who is a resident of the United States

Any estate of a decedent who was a resident of the United States at the time of death

Any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than a “US Pension Plan” or a “US Trust,” each as defined below) (**Specified Legal Entity**), in each case that is organized or incorporated in the United States or having its principal place of business in the United States

Any pension plan for the employees, officers or principals of a Specified Legal Entity, unless the plan is primarily for foreign employees of such entity (**US Pension Plan**)

Any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over its administration

Any commodity pool or other collective investment vehicle that is not a Specified Legal Entity and that is majority-owned by one or more persons described above (**US Collective Investment Vehicle**), except any such entity that is publicly offered only to non-US persons and not offered to US persons

Any Specified Legal Entity (other than a limited liability company, limited liability partnership or similar entity where all the owners have limited liability) that is directly or indirectly majority-owned by one or more persons described above (other than a US Collective Investment Vehicle) and in which such person(s) bear unlimited responsibility for the obligations and liabilities of the entity

"Conduit affiliates" (i.e., non-US entities that have certain trading, ownership or accounting relationships with US affiliates)

Any individual account or joint account (discretionary or not) where the beneficial owner is a US person as described above

The Guidance makes clear that the prongs of the US person definition are not exhaustive and that there may be circumstances not fully addressed by those prongs and situations where the Guidance does not “appropriately resolve whether a person should be included in the interpretation of the term ‘US person.'”

The Rule creates a new concept of "significant risk subsidiary" that replaces the "conduit affiliate" category, provides some additional guidance regarding permissible uses of guarantees, and streamlines some of the categories of US person.

With respect to margining and segregation of margin for uncleared swaps, the CFTC adopted a slightly different definition of “US person.” Accordingly, to the extent that a person engages in swaps transactions, careful analysis of both US person definitions should be conducted to determine the applicable substantive provisions of the swaps regulatory regime.

The SEC has also adopted a "security-based swap" regime for swaps that are deemed to be securities. The SEC swaps regime is similar, though not identical, to the CFTC swaps regime, and a separate analysis of US securities-based swaps activity is necessary.

**Insurance**

State laws in the United States applicable to insurance business will likely be invoked to the extent a foreign company’s conduct involves US persons or entities located within that state.

**Money transmission**

State laws in the United States applicable to money transmission and other money services business will likely be invoked to the extent a foreign company’s conduct involves US persons or entities located within that state. Most states will also have significant surety and bonding requirements. In addition, the federal definition of money transmission may also require registration with FinCEN.

©Copyright © 2024 Baker & McKenzie. All rights reserved. **Ownership**: This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion**: All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites. **Attorney Advertising**: This Content may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction**: Reproduction or copying of the Content on this Site without express written authorization is strictly prohibited.